A

RAMANATHAN CHELLIAH

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASAN LAH JCA
JEFFREY TAN J
[CRIMINAL APPEAL NO: W-09-4-2005]

C

11 MAY 2009

CRIMINAL PROCEDURE: *Jurisdiction of court - Court of Appeal - Whether court has jurisdiction to review and set aside its earlier judgment - Miscarriage of procedural justice - Whether no effective alternative*

D *remedy available - Whether conditions for exercise of court's residual jurisdiction satisfied*

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Whether Court of Appeal has jurisdiction to review and set aside its earlier judgment - Miscarriage of procedural justice - Whether no effective alternative remedy*

E *available - Whether conditions for exercise of court's residual jurisdiction satisfied*

CRIMINAL PROCEDURE: *Judgment - Setting aside - Jurisdiction of Court of Appeal to review and set aside its earlier judgment -*

F *Miscarriage of procedural justice - Whether no effective alternative remedy available - Whether conditions for exercise of court's residual jurisdiction satisfied*

The applicant/accused was convicted by the sessions court on two

G charges of outraging of modesty under s. 354 of the Penal Code. Although the conviction was entered on 8 November 1996, the grounds of judgment were not made available until 26 October 2001, almost five years later. The accused appealed to the High Court. It was clear from the notes recorded by that court that

H several points were argued in support of the appeal, among which were the effect of the long delay by the sessions court to deliver its written reasons and the correctness of its direction unto itself on the standard of proof applicable. However, when the High Court gave its decision, it confined itself to only the delay point

I and direction as to the standard of proof. It held for the accused on both these points and quashed the conviction. The public prosecutor appealed to this court (a differently constituted Bench),

which allowed the appeal and reinstated the conviction. The accused then applied to set aside this court's order on the ground that it had been made without an opportunity being given to him to support the acquittal on grounds other than those given by the High Court.

Held (allowing the application, and setting aside the Court of Appeal's earlier decision)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) This court came to its earlier decision in the absence of the views of the High Court on the other points argued before it. In a matter so important as the appreciation of evidence, this court will be at a serious disadvantage without the benefit of the views of the intermediate appellate court. The accused did attempt to address arguments on the other points raised before the High Court as evidenced in the note of this court's decision delivered at the conclusion of arguments. But the note went on to reject the attempt on the ground that the court was *functus officio*. The accused, as respondent to the appeal, was clearly entitled to put forward other arguments in support of the orders made by the High Court in response to the public prosecutor's appeal. It was plainly obvious that the accused was denied such an opportunity, which constituted a serious departure from the well-established principles of procedural fairness. The accused had, therefore, made out a strong *prima facie* case of a miscarriage of procedural justice warranting the exercise of this court's residual power to set aside its earlier judgment. Since this court was the final arbiter in this case, the accused had no effective alternative remedy to correct the injustice done to him. Thus, the conditions for the exercise of this court's residual jurisdiction were satisfied. (paras 6 & 7)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Pemohon/tertuduh telah disabit oleh mahkamah sesyen atas dua tuduhan mencabul kehormatan di bawah s. 354 Kanun Keseksaan. Walaupun sabitan telah dicatat pada 8 November 1996, alasan-alasan penghakiman tidak disediakan hingga 26 Oktober 2001, iaitu hampir lima tahun kemudian. Tertuduh merayu ke Mahkamah Tinggi. Ia adalah jelas daripada nota-nota yang direkod oleh

A mahkamah bahawa beberapa perkara telah dihujah untuk menyokong rayuan itu, di antaranya ialah akibat kelewatan yang lama oleh mahkamah sesyen untuk menyampaikan sebab-sebab bertulisnya dan ketepatan arahannya terhadap dirinya atas standard bukti yang harus digunakan. Walau bagaimanapun, apabila
B Mahkamah Tinggi memberi keputusannya, ia menghadkan dirinya kepada perkara kelewatan dan arahan mengenai standard bukti. Ia membuat keputusan yang berpihak kepada tertuduh atas kedua-dua perkara ini dan membatalkan sabitan itu. Pendakwa raya merayu ke mahkamah ini (terdiri dari Anggota Kehakiman yang
C berlainan), yang telah membenarkan rayuan itu dan menghidupkan semula sabitan itu. Tertuduh kemudiannya memohon untuk mengenepikan perintah mahkamah ini atas alasan bahawa ia telah dibuat tanpa memberi beliau peluang untuk menyokong pembebasannya atas alasan-alasan lain daripada yang telah diberi
D oleh Mahkamah Tinggi.

Diputuskan (membenarkan permohonan, dan mengenepikan keputusan terdahulu Mahkamah Rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman
E **mahkamah:**

(1) Mahkamah ini mencapai keputusan terdahulunya dalam ketiadaan pandangan Mahkamah Tinggi atas perkara-perkara lain yang telah dihujah di hadapannya. Dalam suatu perkara
F yang begitu penting seperti pertimbangan keterangan, mahkamah ini akan berada dalam keadaan yang merugikan tanpa manfaat pandangan mahkamah rayuan perantaraan. Tertuduh telah mencuba untuk berucap mengenai hujahan-hujahan atas perkara-perkara lain yang telah dibangkitkan di
G hadapan Mahkamah Tinggi seperti yang dibuktikan dalam nota keputusan mahkamah ini yang disampaikan pada penghujung hujahan-hujahan. Tetapi nota itu seterusnya menolak percubaan itu atas alasan bahawa mahkamah adalah *functus officio*. Tertuduh, sebagai responden kepada rayuan, jelas
H berhak untuk mengemukakan hujahan-hujahan lain untuk menyokong perintah-perintah yang telah dibuat oleh Mahkamah Tinggi sebagai respons kepada rayuan pendakwa raya. Ia adalah amat jelas bahawa tertuduh telah dinafikan peluang sebegitu, yang merupakan satu kekhilafan serius prinsip-prinsip
I mantap prosedur keadilan. Tertuduh telah, oleh itu, membuktikan suatu kes kukuh *prima facie* salah laksana prosedur keadilan yang mewajarkan mahkamah ini menggunakan kuasa bakinya

untuk mengenepikan penghakiman terdahulunya. Oleh kerana mahkamah ini merupakan penentu muktamad dalam kes semasa, tertuduh tidak mempunyai remedi alternatif yang efektif untuk membetulkan ketidakadilan yang berlaku kepadanya. Oleh yang demikian, syarat-syarat bagi pelaksanaan kuasa baki mahkamah ini telah dipenuhi.

[Diperintah sedemikian.]

Case(s) referred to:
Badan Peguam Malaysia v. Kerajaan Malysia [2009] 1 CLJ 833 FC ***(refd)***
Taylor v. Lawrence [2002] EWCA Civ 90 ***(refd)***
Chu Tak Fai v. PP [2006] 4 CLJ 931 FC ***(refd)***

Legislation referred to:
Penal Code, s. 354

For the applicant - Karpal Singh (Sangeet Kaur Deo with him); M/s Karpal Singh & Co
For the respondent - Jamhirah Ali DPP; AG's Chambers

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] The applicant (whom we will refer to as the accused throughout this judgment) was convicted by the sessions court at Kuala Lumpur on two charges of outraging of modesty under s. 354 of the Penal Code. The conviction was entered on 8 November 1996. However, the grounds of judgment were not made available until 26 October 2001, that is to say almost five years later. The accused appealed to the High Court. It is clear from the notes recorded by that court that several points were argued in support of the appeal. Among these was the effect of the long delay by the sessions court to deliver its written reasons as well as the correctness of its direction unto itself on the standard of proof applicable. However, when the High Court came to give its decision, it confined itself to only the delay point and direction as to the standard of proof. It held for the accused on both these points and quashed the conviction. The public prosecutor being dissatisfied with the acquittal appealed to this court, a differently constituted bench of which allowed the appeal

A and reinstated the conviction. The accused then applied to set aside the order of this court on the ground that it had been made without an opportunity being given to him to support the acquittal on grounds other than those given by the High Court. We heard argument and in a reserved decision set aside the earlier order of
B this court and gave certain directions to which we will refer later in this judgment. In arriving at our decision we had perforce to address two issues. First, whether this court has jurisdiction to review its earlier decision in an appeal heard and disposed by it. Second, if there is jurisdiction, then the circumstances in which the
C review is available.

[2] We will take the question of jurisdiction first. It is now settled that the Court of Appeal has jurisdiction to review its own decision in a given case. See, *Taylor v. Lawrence* [2002] EWCA
D Civ 90, where it was held as follows:

> The Court of Appeal had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. The court had implicit powers to do that which was necessary to achieve the dual
E objectives of an appellate court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A court had to have
F such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised.

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See also, *Chu Tak Fai v. Public Prosecutor* [2006] 4 CLJ 931.

[3] We are of the view that it is important to recognise that this Court has a residual jurisdiction to reopen an appeal which it had already determined particularly in cases where there is no further
H recourse to a party. In a case as the present, since the accused was tried in a subordinate court, this court is the court of last resort. The jurisdiction to reopen and review is therefore important in a case as the present to ensure that a manifest injustice does not go by uncorrected.

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[4] That brings us to the second issue. The residual jurisdiction will be exercised: A

> if it can be shown that there was a probability of a significant injustice which must be clearly established and that there was no effective alternative remedy to correct this injustice. It must be shown that the trial or the appeal has been critically undermined. The jurisdiction is not solely concerned with the case where the earlier process has or may have produced a wrong result. It must also be shown that there was special circumstances which resulted in the process having been corrupted. In short, the purpose is to correct the injustice. (per Zaki Tun Azmi CJ in *Badan Peguam Malaysia v. Kerajaan Malysia* [2009] 1 CLJ 833. B C

[5] In our judgment the present case is one in which an injustice was occasioned and there is no effective alternative remedy available to the accused. As to the former, our reasons are as follows. It is clear from the affidavits filed that when the public prosecutor's appeal came before this court, counsel on both sides only argued on the two points relied upon by the High Court to quash the conviction. What comes across from the judgment of this court is that the court proceeded to deal with other points in the case as evidenced by the following passage: D E

> We also found that the findings of the Sessions Court Judge which had been alluded to earlier, where she accepted the evidence of material witnesses, SP1 and SP2 and that the ingredients of the offence with which the respondent had been charged, was successfully proven by the prosecution (see pp. 619- 624 and 664 A.R.) were correct and proper. We find no misdirection of the facts and evidence on the part of the trial judge. F
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> A proper finding of facts and the application of the correct legal principles by the trial Judge, clearly seen in the 95 over pages of the ground of judgment, ought not be disturbed. In view of the above, we therefore find no good reason for appellate intervention, much less order a retrial for hearing this appeal on its merits as proposed by the respondent. G

[6] It is important to observe that this court came to the foregoing decision in the absence of the views of the High Court on the other points argued before it. In a matter so important as the appreciation of evidence, this court will be at a serious disadvantage without the benefit of the views of the intermediate appellate court. The accused did attempt to address arguments on the other points raised before the High Court as evidenced in the H I

note of this court's decision delivered at the conclusion of arguments. But the note goes on to reject the attempt on the ground that the court was *functus officio*. In our judgment, the accused, as respondent to the appeal was clearly entitled to put forward other arguments in support of the orders made by the High Court in response to the public prosecutor's appeal. It is plainly obvious from the material we have thus far referred that such an opportunity was denied the accused. This denial constitutes a serious departure from well established principles of procedural fairness. The accused has therefore made out a strong *prima facie* case of a miscarriage of procedural justice warranting the exercise of the residual power of this court to set aside its earlier judgment.

[7] As for the latter consideration, as we have already said, this court is the final arbiter in cases of this sort. Accordingly, the accused has no effective alternative remedy to correct the injustice done to him. It follows from what we have said thus far that the conditions for the exercise of this court's residual jurisdiction are satisfied. We therefore have no alternative but to allow the accused's motion and to set aside this court's earlier decision. The appeal shall be re-heard by a differently constituted Bench of this court on all points save those already ruled upon in the earlier judgment. Since all points were taken before the High Court as to the correctness of the sessions court's decision, its views on the merits are of critical importance. We accordingly direct the High Court to furnish its views on the other points argued before it. The accused was a free man until the reversal of the High Court's decision. The consequence of our setting aside the earlier order of this court is that he shall be set at liberty forthwith pending the re-hearing of the public prosecutor's appeal.